

DONALD CRAIG MITCHELL  
Alaska Bar No. 7605046  
1335 F Street  
Anchorage, Alaska 99501  
(907) 276-1681  
dcraigm@aol.com

Attorney for Plaintiff

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ANDREE McLEOD, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 ) No. 3AN-08-10869 CI  
 SEAN PARNELL, in His Official )  
 Capacity as Governor of Alaska, )  
 and the OFFICE OF THE GOVERNOR )  
 OF ALASKA, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

MOTION FOR RECONSIDERATION

Pursuant to Alaska Rule of Civil Procedure 77(k)(1)(iii), plaintiff Andree McLeod moves the court to reconsider the Order Granting State's Motion for Summary Judgment that the court entered in this action on January 22, 2010 [hereinafter "January 22 Order"]. The ground for this motion is that the court overlooked, misapplied, or failed to consider a statute - A.S. 40.21.150(6) - that is directly controlling.

Plaintiff McLeod filed this action for two narrow purposes. First, to establish that an email that a state employee sends or receives on his or her private email account (rather than on his or her State of Alaska email account) and whose content involves the transaction of official state business is a "public record" for the purposes of the Public Records Act, A.S. 40.25.110 et seq., and a public "record" for the purposes of the Records Management Act, A.S. 40.21.010 et seq. And second, to establish that using private email accounts to create A.S. 40.25.220(3) "public records" is a per se violation of A.S. 40.25.125, which prohibits the "obstruction" of the public's right to inspect "public records."

In its January 22 Order, the court announced that by including the single undefined word "preserved" in A.S. 40.25.220(3), the Alaska Legislature intended that no record created or received by an employee of a state agency - no matter whether that record is an email created or received on a private email account, an email created or received on a State of Alaska email account, or a hard copy document, e.g., a memorandum, study, report, etc. - is an A.S. 40.25.220(3) "public record" until such time, if at all, that the agency whose employee created or received it "preserves" the record. And if for any reason (including the bad motive of wanting to prevent the public

from finding out about the existence of the record) the agency decides not to "preserve" the record, the public has no right to inspect it.

That extraordinary interpretation of legislative intent transcends the disagreement between plaintiff McLeod and the defendants regarding the use of private email accounts to conduct state business because it guts (and there is no other word for it) the entire Public Records and Records Management Acts, even though the Alaska Legislature explicitly intended public inspection to be the means for plaintiff McLeod and other members of the Alaska public to "maintain citizen control of government." See Section 1, Chapter 200, SLA 1990.

Of equal importance (and the central point of this motion), in reasoning to its interpretation of legislative intent, the court ignored the fact that in the Records Management Act - a statute that the defendants correctly urged the court to read in pari materia with the Public Records Act - A.S. 40.21.150(6) explicitly states that a record is a "record" for the purposes of the Records Management Act if it 1) was "developed or received . . . in connection with the transaction of official business," and 2) has been "preserved" or is "appropriate for preservation."

So even if an agency has not "preserved" a record, the Alaska Legislature intended that record to be a public "record"

for the purposes of the Records Management Act (and available for public inspection pursuant to A.S. 40.21.030) if the record is the type of record that a reasonable person would conclude would be "appropriate for preservation."

Plaintiff McLeod spent three pages of the memorandum she filed in opposition to the defendants' motion to dismiss or for summary judgment pointing out that important point to the court. See Opposition Memorandum, at 16-18. But rather than acknowledging that statutory construction argument and then either accepting or rejecting it, in its January 22 Order the court not only made no mention of the argument, the court summarily brushed by it. See January 22 Order, at 11.

In the brushing by the court simply noted in passing that the text of the A.S. 40.21.150(6) "records" definition and the text of the A.S. 40.25.220(3) "public records" definition are "strikingly similar" without acknowledging the determinative fact that the two definitions also are strikingly dissimilar insofar as the controlling question of legislative intent at issue in this action is concerned. For that reason, the court should reconsider its January 22 Order.

Finally, it should be noted that this action began on October 1, 2008 when plaintiff McLeod filed a Public Records Act request to inspect emails that then Governor Sarah Palin had sent

or received on her private email accounts, including, but not limited to, gov.sarah@yahoo.com and gov.palin@yahoo.com. See Plaintiff's Exhibit A.

In its January 22 Order the court announced that none of those emails are subject to public inspection pursuant to the Public Records Act (or the Records Management Act) because the defendants had made a decision not to "preserve" the emails. Nevertheless, as of January 29, 2010 defendant Office of the Governor and the Alaska Department of Law are continuing to process plaintiff McLeod's October 1, 2008 request and similar Public Records Act requests for the same emails that have been submitted by, among other requesters, the Associated Press (Mark Thiessen), MSNBC (Bill Dedman), and Mother Jones Magazine (David Corn).

So contrary to the court's view of it, the defendants apparently continue to consider the emails to be A.S. 40.25.220(3) "public records."

#### Conclusion

For the reasons set forth above, plaintiff Andree McLeod requests the court to grant her motion for reconsideration.

DATED: February 1, 2010

---

Donald Craig Mitchell  
Attorney for Plaintiff